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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [REDACTED]

Office: Vermont Service Center

Date:

SEP 25 2001

IN RE: Applicant:



APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:



Public Copy

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:


This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native and citizen of the Dominican Republic who was admitted to the United States on December 10, 1993, as a nonimmigrant visitor with authorization to remain until June 9, 1994. She failed to depart by that date. On October 31, 1994, an Order to Show Cause was issued in her behalf. On April 18, 1995, the applicant admitted to the charges listed on the Order to Show Cause. On December 29, 1995, an immigration judge found the applicant deportable, denied her request for voluntary departure, and ordered her deported to the Dominican Republic. On August 15, 1997, the Board of Immigration Appeals (the Board) affirmed the immigration judge's decision and a Warrant of Removal was issued on July 31, 1998. Therefore she is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant married a U.S. citizen on May 13, 1994, while still maintaining her status, and she is the beneficiary of an approved petition for alien relative. The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to remain in the United States.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel states that the Service failed to consider all of the favorable facts. Counsel submits affidavits in which both parties indicate that they married out of love and are still living together happily. The applicant indicates that she has no criminal history and did not leave the United States because it would cause great emotional suffering, and it would be an extreme hardship due to her son's medical condition. The record reflects that the applicant's twenty-one year old son is being treated for sickle cell disease.

The record reflects that the applicant was found deportable for having been in the United States in violation of law and for having procured admission by fraud or willful misrepresentation of a material fact at entry. Therefore she is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i). The immigration judge determined that the applicant had entered into a sham marriage with Francisco Caraballo for the purpose of obtaining lawful permanent residence. The Board affirmed that decision on August 15, 1997, and denied a motion to reopen on June 29, 1998, and determined that the applicant is precluded from obtaining a visa petition approval under section 204(c) of the Act, 8 U.S.C. 1154(c). A petition for alien relative filed on October 9, 1997, was denied by the director.

In Matter of Isber, 20 I&N Dec. 676 (BIA 1993), the Board held that section 204(c) of the Act does not preclude approval of a second marital visa petition filed by a petitioner on behalf of the same

beneficiary. A second petition for alien relative filed on May 18, 1998, was approved by the director on August 22, 1998.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

Section 212(a)(9)(A) of the Act provides, in part, that:

(i) Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. In the absence of explicit

statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

In IIRIRA, Congress imposed restrictions on benefits for aliens, enhanced enforcement and penalties for certain violations, eliminated judicial review of certain judgments or decisions under certain sections of the Act, created a new expedited removal proceeding, and established major new grounds of inadmissibility. Nothing could be clearer than Congress's desire in recent years to limit, rather than to extend, the relief available to aliens who have violated immigration law. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See Fiallo v. Bell, 430 U.S. 787 (1977); Reno v. Flores, 507 U.S. 292 (1993); Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). See also Matter of Yeung, 21 I&N Dec. 610, 612 (BIA 1997).

Although the Service promulgated guidelines for considering permission to reapply for admission applications in Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973), and in Matter of Lee, 17 I&N Dec. 275 (Comm. 1978), these holdings were rendered long before Congress amended the Act from 1981 through the present 1996 IIRIRA amendments and beyond. Even though these decisions have not been overruled, Congress and the courts following the 1981 amendments and onward have clearly shown in the legislation and in their decisions that individuals who violate immigration law are viewed unfavorably. The later statutes and judicial decisions have effectively negated most precedent case law rendered prior to 1981. Such case law is still considered but less weight is given to favorable factors gained after the violation of immigration laws following statutory changes and judicial decisions.

Even the Regional Commissioner in Tin held that an alien's unlawful presence in the United States is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully.

After reviewing the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, and after noting that Congress has increased the bar to

admissibility from 5 to 10 years, has also added a bar to admissibility for aliens who are unlawfully present in the United States, and has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted, it is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993). It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that after-acquired equities, referred to as "after-acquired family ties" in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States in December 1993 as a nonimmigrant and married her spouse while still maintaining her nonimmigrant status. Therefore, her equity cannot be deemed as "after-acquired."

The favorable factors in this matter are the applicant's family tie, the absence of a criminal record, the approved petition for alien relative, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's remaining longer than authorized, her being found deportable, her failure to depart, her lengthy unlawful presence in the United States. The Commissioner stated in Matter of Lee, supra, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

Although the applicant's actions in this matter cannot be condoned, her equity (marriage) was not gained while being unlawfully present in the United States or entered into while in deportation proceedings. Therefore, that equity can be given full weight. The applicant's marriage appears to be bona fide as she has been married for seven years. The applicant has now established by

supporting evidence that the favorable factors outweigh the unfavorable ones.

The issue regarding her inadmissibility under section 212(a)(6)(C)(i) of the Act was determined by an immigration judge and that decision is binding on the Associate Commissioner. That issue must be resolved in another proceeding where the applicant must show that extreme hardship would be imposed upon the only qualifying relative in this matter, her husband.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has established that she warrants the favorable exercise of the Attorney General's discretion.

ORDER: The appeal is sustained. The director's decision is withdrawn, and the application is approved.